No. ~~1094~~ 65

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES, PETITIONER

v.

CALLAHAN WALKER CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

CITATIONS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on January 5, 1942.

OPINION BELOW

The opinions of the Court of Claims (R. 11–21) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1942 (R. 21). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether an equitable adjustment made by the contracting officer under the standard form Government construction contract is final and binding on all issues of fact or law in the absence of an appeal to the department head in accordance with Articles 3 and 15.

2. Whether the determination of what constitutes an equitable adjustment under Article 3 is a question of fact within the meaning of Article 15 of the contract.

STATEMENT

Respondent, on August 27, 1931, entered into a written contract with the United States for the construction of a levee on the Mississippi State side of the Mississippi River (R. 5). The contract involved the placing of about 3,881,600 cubic yards of earth work and fixed the price for material placed at 14.43¢ per cubic yard (R. 4). The proposed levee was to be set back a short distance from an existing levee, the earth in which, together with that contained in certain land between it and the site of the new levee, was made available for construction purposes (R. 6). The present controversy involves additional work on a section of the new levee extending from station 5113 to station 5123, a distance of 1,000 feet (R. 6).

Respondent commenced work at the south end of the project and proceeded northward (R. 6).

During progress of the work, certain parts of the levee which had been completed south of station 5123 were found to have a tendency to subside (R. 6). At that time 68 percent of the work between station 5123 and station 5113 had been completed (R. 6). Respondent was directed to continue construction of the levee from a point north of station 5113 while investigations were being conducted as to the cause of the subsidence (R. 6). After making numerous tests, it was concluded that the construction of false berms,[1] considerably larger than that called for by the specifications, would check the subsidence. Accordingly, the contracting officer and the engineer officer at the site advised respondent that it would be expected to construct an enlarged berm on the riverside portion of the levee (R. 6–7). The United States undertook to, and did, construct an enlarged berm on the landside of the levee (R. 10).

Respondent protested against construction of the enlarged berm, contending that it constituted a change in the contract, and that the work could not be performed at the contract price because there was not sufficient material readily available on the riverside of the levee opposite the portion at which the false berm was to be located to construct both the berm and levee (R. 6, 23, 39, 42, 49, 57). It contended that additional material

[1] A false (or artificial) berm is an earthwork, extending on either side of the base of a levee, which reinforces the foundation of the levee proper.

would have to be brought to the site from other points and that the cost of handling the additional material would exceed the contract price (R. 51–52). The contracting officer and the engineer officer were of the opinion that adequate material was available at the site, and that no increase in cost would be incurred (R. 39, 40, 41); they accordingly issued oral instructions to respondent to erect the enlarged false berm. Respondent protested orally to the contracting officer, and stated that it would later assert a claim for the extra costs which it expected to incur in constructing the berm (R. 6). On October 18, 1932, a written order directing construction of the false berm was issued by the contracting officer to respondent (R. 6). In that order respondent was advised that it would be given 100 percent credit for the embankment to the south of station 5123 where the subsidence had occurred, and that payment for additional yardage made necessary by the construction of the false berm would be made at the contract price per cubic yard (R. 7). The additional work required by the change order was necessary for completion of the project (R. 7).

Article 3 of the contract reads as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the gen-

eral scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 provides as follows:

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the con-

tractor shall diligently proceed with the work as directed.

Respondent made no claim for an equitable adjustment after the change order was issued, and did not appeal from the order to the head of the department (R. 24, 26, 27, 31). It subsequently developed that additional material had to be drifted into the site of the work (R. 8-9). The work of drifting or hauling in the material was performed by a subcontractor, who agreed to accept the contract price in full payment if respondent were unable to secure an additional allowance from the United States (R. 9). Respondent was paid for the additional work at the contract rate of 14.43¢ per cubic yard (R. 8), which it accepted under protest (R. 8). On December 28, 1932, respondent filed a claim with the contracting officer for $16,952.79, as representing the excess cost of the additional work over the contract price (R. 10-11). No part of the claim was paid, and respondent filed suit in the Court of Claims on August 6, 1935. The court entered judgment for respondent in the sum of $13,989.92, two judges dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The court erred:

1. In holding that it had authority to review the order of the contracting officer and to substitute its own views for his judgment.

2. In holding that what constitutes an equitable adjustment under Article 3 of the contract is a question of law.

3. In holding that the terms of the order of the contracting officer specifying the contract price per cubic yard for additional yardage constituted a conclusion of law and not a decision on a disputed issue of fact within the meaning of Article 15 of the contract.

4. In holding that the contracting officer was without authority to decide any issue of law or construction of the contract arising under Article 3 of the contract.

5. In making an independent determination that the change order issued by the contracting officer resulted in an increase in the cost of performance per cubic yard.

6. In making an independent determination that respondent was entitled to an increase in the amount due under the contract per cubic yard as a result of the change order issued by the contracting officer.

7. In making an independent determination of the amount of increase per cubic yard due respondent.

8. In failing to find as facts that respondent made no claim for adjustment within ten days from the date of the order of the contracting officer and that respondent took no appeal to the head of the department within thirty days from

the date of the order in accordance with Articles 3 and 15 of the contract.

9. In failing to hold that the order of the contracting officer, in the absence of an appeal to the head of the department as provided in Articles 3 and 15 of the contract, was final and binding, and not subject to judicial review on all issues of fact or law arising under Article 3 of the contract.

10. In failing to hold that the order of the contracting officer could not be set aside when no appeal therefrom had been made to the head of the department.

11. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

The majority of the court below held that the question whether the amount allowed by the contracting officer is an "equitable adjustment" as required by Article 3 is one of law (R. 20–21, 24, 26), and that since Article 15 limits the contracting officer's authority to settle disputes to questions of fact only, he therefore was without authority to resolve disagreements concerning the amount of an adjustment under Article 3 (R. 2, 16, 18–19). Accordingly, it held that the contractor's failure to appeal to the department head in the manner provided by Article 15 was immaterial and that the court below was entitled to make an independent determination of the amount which should be allowed the respondent as an

equitable adjustment for any increased cost caused by the change order.[2] Judge Madden filed a dissenting option, in which Judge Jones concurred (R. 19–21).

The question presented, we submit, is one of manifest importance. The provisions of Articles 3 and 15 have been included in the standard form Government contruction contract since 1926.[3] The

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[2] The opinion of Judge Green, concurred in only by Chief Justice Whaley, also rests on the alternative ground that the contracting officer had failed to make any equitable adjustment and that this constituted a breach of contract (R. 18). This conclusion, however, was based solely on the fact that, as appeared from the face of the change order, the contracting officer had allowed only the contract price for additional yardage, although, as the two judges found, the change order resulted in an increased cost per cubic yard (R. 18); it was therefore apparently inferred that the contracting officer had construed the contract to require the contractor to supply the additional yardage at the contract price without regard to whether any increase in cost would result. As Judge Green's alternative ground rests on a finding as to the increased cost caused by the change order, it cannot be sustained unless determinations as to such matters are for the court rather than for the contracting officer. The contracting officer had concluded that in fact no increase of cost would result (R. 27–30). Moreover, even if the contracting officer had not attempted to make an equitable adjustment, the contractor could not complain since he failed to make a claim for such adjustment within ten days from the date of the change order as required by Article 3.

[3] Similar provisions are included in the standard form for other types of Government contracts. Article 15 of P. W. A. Form No. 51, which has been used by the Public Works Administration, authorizes the contracting officer to settle all disputes without limitation to issues of fact, and in some standard form contracts equally broad provisions have been

issuance of change orders and accompanying adjustments in price under Article 3 is, of course, a matter of general practice and is a common source of litigation in the Court of Claims. The question whether disputes as to the amount of adjustment are to be settled judicially or, as the contract apparently contemplates, by the contracting officers and department heads, is thus one which closely touches the day to day administration of Government construction contracts generally.

The novel doctrine announced below cannot readily be rested on accepted principles or any provision of the standard form contract. The contract provisions, which were presumably intended to avoid vexatious and expensive litigation, should be given hospitable scope. *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Martinsburg & Potomac R. R. Co.* v. *Marsh*, 114 U. S. 549, 553. The authority granted by Article 3 to the contracting officer to make equitable adjustments is not limited in terms to issues of fact and the reference in that provision to Article 15 was intended, we suggest, to incorporate the procedure pre-

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included in the specifications. Under provisions of this character, if properly construed, the distinction between questions of fact and questions of law would seem immaterial. Cf. *United States* v. *McShain*, 308 U. S. 512. It is impossible to say what percentage of Government contracts employ the standard form "disputes" clause limiting the contracting officer's authority to the determination of issues of fact but there is no doubt that this clause has been widely used.

scribed by the latter provision for the settlement of any issue with respect to an adjustment under Article 3 and not to limit the contracting officer's authority to the settlement of issues of fact. The question, in situations like that presented in the instant controversy, of what adjustment is to be made because of changed conditions which are asserted to give rise to increased cost is one which the contracting officer and the department heads are specially competent to decide. The procedure of conclusive administrative determination is therefore particularly appropriate. Accordingly, it seems clear that the procedure was intended to be applied to adjustment issues whether or not they be termed issues of law or of fact.

In any event, the contracting officer's determination of the price to be paid for the additional work was solely one of fact. The construction of the terms of the contract obligation, which on familiar principles might be deemed an issue of law, was not in controversy; the contracting officer properly assumed that the respondent was entitled to an amount sufficient to compensate him for any over-all increase of cost (R. 29–30). The sole inquiry was whether and to what extent the change order would result in an increase of cost, and this seems obviously a question of fact.

The decisions of this Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119; and *Securities Commission* v. *United States Realty*

Co., 310 U. S. 434, 452, which were thought by the court below to require a contrary conclusion, are not in point. They merely hold that the term "fair and equitable" as used in Section 77B and Chapters X and XI of the Bankruptcy Act are "words of art" which have acquired a fixed meaning under prior decisions of this Court and that the question whether any plan of reorganization conforms to the statutory standard is for the courts and not for the majority of the security holders. The novel application of these rulings to the wholly unrelated field of equitable adjustments under Government contracts suggests that an authoritative decision of this Court clarifying the reach of its decisions in the reorganization cases is necessary. Cf. *English Construction Co., Inc.* v. *United States* (D. Del.), decided January 14, 1942.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

U. S. GOVERNMENT PRINTING OFFICE, 1942